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Twin Unitrade Sdn Bhd v TSK Hardware Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-14–05 OF 2020
NADZARIN WOK NORDIN JC
30 DECEMBER 2020

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Companies and Corporations — Judicial management — Applicant granted judicial management order — Proposed intervener applied to set aside judicial management order — Applicant applied for extension of time to serve affidavit in reply to proposed intervener's application to intervene — Whether applicant entitled to extension of time to serve affidavit in reply — Whether there was delay in filing application to intervene in judicial management order — Whether applicant's director had locus to affirm affidavit in opposing application to intervene judicial management order — Whether applicant failed to enclose any resolution which approved application for judicial manager to be appointed over the company — Whether judicial management order entitled to be set aside — Companies Act 2016 s 405(1)(b)

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By way of an application to intervene in encl 14 by the proposed intervener, TSK Hardware Sdn Bhd ('PI'), the PI had applied, inter alia, to set aside the judicial management order dated 9 July 2020 granted by the court to the applicant, Twin Unitrade Sdn Bhd ('the applicant'). The applicant applied in

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encl 29 for an order for an extension of time to serve the applicant's affidavit in reply to encl 14 affirmed on 8 October 2020 which could be found in encl 23. The judicial manager, Dato Dr Shammuganathan a/l Vellathurai ('JM') had filed an application for an order for an extension of time of 60 days ('EOT') from the date of the order for the judicial management to send a statement of

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proposal to the creditors of the applicant in compliance with s 420(1) of the Companies Act 2016 under encl 17 which had yet to be heard pending the decision of the court in encls 29 and 14. The applicant was a private limited company having a business in Johor Bahru as builders and contractors. The PI had sold and delivered building materials to the applicant amounting to

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RM350,929.71. As a result of the applicant's failure to pay the PI the materials supplied, the PI had commenced an action against the applicant vide Sessions Court Johor Bahru Writ No JA-B52NCC-227–12 of 2019 ('the civil suit'). The applicant had filed an ex parte originating summons for the applicant to be placed under the judicial management of a judicial manager under s 405 of the

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Companies Act 2016. The PI had obtained a judgment for the sum of RM524,105.92 ('the judgment') against the applicant vide a summary judgment application in the civil suit. On 9 July 2020 the Kuala Lumpur High Court had granted order in terms for the judicial management application and appointed the judicial manager. Due to the failure of the applicant to make

payment towards the judgment, the PI had also attempted to garnish the applicant's Affin Islamic Bank account by way of an order of court but was informed by the JM that there was a judicial management order in place. The PI then filed a proof of debt with the JM on 28 July 2020. To-date there was no challenge by the applicant as to the debt owed to the PI.

Held:

(1) After considering the grounds as relied on by the applicant for encl 29 and applying O 2 r 1 of the Rules of Court 2012 ('the Rules') on the effect of non-compliance of the Rules, there was no miscarriage of justice or prejudice caused to the PI and that in the interest of justice, the court would allow the applicant's affidavit in reply at encl 22 to be deemed as good service and accordingly granted order in terms for encl 29 (see para 25).

(2) There was no inordinate delay in filing encl 14 as the PI was only made aware of the judicial management order by way of the judicial manager's letter dated 20 July 2020 addressed to Affin Islamic Bank and copied to the PI in encl 15 and that the PI had after filing their POD on 28 July 2020 and obtaining no response, filed encl 14 on 30 September 2020 which was a total of approximately slightly over two months from the time that the PI had notice of the judicial management order (see para 26).

(3) The PI had served encl 14 on the applicants solicitors and it would be inequitable to deny the applicant its right to a response or to oppose encl 14. The court was of the view that the director of a company under a judicial management order did not lose his residual powers in the sense of or not involving any matters not coming within the purview of the judicial manager once a judicial management was obtained. Enclosure 14 affected the judicial management order which was applied for by the applicant and it would be unjust to disallow and/or deny the applicant in the situations the right to be heard and to oppose encl 14 which had the effect of setting aside the very judicial management order which the applicant had applied for. The court disagreed with the PI on the issue of the applicant's director having no locus to affirm any affidavit in opposing the said encl 14 (see paras 28–29).

(4) It was clear that any party may apply to intervene in a proceedings more so when the proceedings before the court and the order given was based on an ex parte application as any ex parte order was liable to be set aside by the party who had been served with such an order or by any party which was affected by such order (see para 31).

(5) On the issue that the applicant had failed to enclose any resolution which had approved the application for a judicial manager to be appointed over

the company, there was no requirement under ss 404 and 405 of the Companies Act 2016 nor under the Companies (Corporate Rescue Mechanism) Rules 2018 for any resolution to be attached to the judicial management application with regards the applicant's company approval in the application for a judicial manager to be appointed over the company. The applicant had not satisfied the court as to the assertions with regards the respective 'creditors' of the applicant vis a vis the purported consent judgments and the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') claims which were not exhibited in any of the applicant's affidavits before the court. As the applicant failed to prove the debts owed to the other creditors, the PI would in the circumstances have to be considered the biggest creditor of the applicant (see paras 32 & 34–35).

(6) As the applicant had failed to make a full and frank disclosure of all material facts before the court at the time of the judicial management application, the finding that there was a surreptitious act of concealing the judicial management application in the civil suit, the averments by the applicant an the judicial management with regards the applicants creditors vide the purported consent judgments and the CIPAA claims which were not exhibited before the court were mere assertions or bare averments and it was proven that the judicial management's application for an extension of time would be an exercise in futility where the PI, based on the evidence before the court and as the majority creditor would be entitled to oppose the proposal by virtue of s 412(2) of the Companies Act 2016, the court allowed the PI's application to set aside the judicial management order (see para 39).

[Bahasa Malaysia summary

Melalui permohonan untuk mencelah berdasarkan lampiran 14 oleh pencelah yang dicadangkan, TSK Hardware Sdn Bhd ('PI'), PI telah memohon, antara lain, untuk mengetepikan perintah pengurusan kehakiman bertarikh 9 Julai 2020 yang diberikan oleh mahkamah kepada pemohon, Twin Unitrade Sdn Bhd ('pemohon'). Pemohon memohon melalui lampiran 29 satu perintah untuk lanjutan masa bagi menyampaikan afidavit jawapan pemohon kepada lampiran 14 yang diikrarkan pada 8 Oktober 2020 yang boleh didapati pada lampiran 23. Pengurus kehakiman, Dato Dr Shammuganathan a/l Vellathurai ('PK') telah memfailkan permohonan untuk satu perintah lanjutan masa 60 hari ('EOT') dari tarikh perintah agar pihak pengurusan kehakiman menyampaikan pernyataan usul kepada pemiutang bagi pemohon bersesuaian dengan s 420(1) Akta Syarikat 2016 melalui lampiran 17 yang belum didengar sementara menunggu keputusan mahkamah di lampiran 29 dan 14. Pemohon adalah syarikat sendirian berhad yang mempunyai perniagaan di Johor Bahru sebagai pembinaan dan kontraktor. PI telah menjual dan menghantar bahan binaan kepada pemohon dengan jumlah RM350,929.71. Disebabkan

pemohon telah gagal membayar PI bahan yang dibekalkan, PI telah memulakan tindakan terhadap pemohon melalui Mahkamah Sesyen Johor Bahru Writ No JA-B52NCC-227–12 Tahun 2019 ('tindakan sivil tersebut'). Pemohon telah memfailkan saman pemula ex parte agar pemohon diletakkan di bawah pengurusan kehakiman seorang pengurus kehakiman di bawah s 405 Akta Syarikat 2016. PI telah memperoleh penghakiman bagi jumlah RM524.105.92 ('penghakiman tersebut') terhadap pemohon melalui permohonan penghakiman terus dalam saman sivil tersebut. Pada 9 Julai 2020, Mahkamah Tinggi Kuala Lumpur telah membenarkan perintah untuk permohonan pengurusan kehakiman dan melantik pengurus kehakiman. Oleh kerana kegagalan pemohon untuk membuat pembayaran terhadap penghakiman tersebut, PI juga telah memohon untuk mengarnis akaun Affin Islamic Bank pemohon berdasarkan perintah mahkamah tersebut tetapi telah dimaklumkan oleh JM bahawa terdapat perintah pengurusan kehakiman berjalan. PI kemudian memfailkan bukti hutang kepada JM pada 28 Julai 2020. Setakat ini tidak ada bantahan oleh pemohon mengenai hutang yang kena dibayar kepada PI.

Diputuskan:

(1) Setelah mempertimbangkan alasan seperti yang digantung oleh pemohon melalui lampiran 29 dan menggunakan A 2 k 1 Kaedah-Kaedah Mahkamah 2012 ('Kaedah tersebut') mengenai kesan ketidakpatuhan Kaedah tersebut, tidak ada ketidakadilan atau prejudis yang disebabkan oleh PI dan bahawa demi kepentingan keadilan, mahkamah akan membenarkan afidavit jawapan pemohon pada lampiran 22 untuk dianggap sebagai penyampaian sempurna dan seterusnya membenarkan perintah seperti dipohon dalam lampiran 29 (lihat perenggan 25).

(2) Tidak ada kelewatan berlebihan dalam memfailkan lampiran 14 kerana PI hanya dimaklumkan mengenai perintah pengurusan kehakiman melalui surat pengurus kehakiman bertarikh 20 Julai 2020 yang dialamatkan kepada Affin Islamic Bank dan disalin kepada PI dalam lampiran 15 dan PI setelah memfailkan POD mereka pada 28 Julai 2020 dan tidak mendapat balasan, memfailkan lampiran 14 pada 30 September 2020 yang anggaran jumlahnya adalah lebih sedikit dari dua bulan pada masa PI mendapat notis mengenai perintah pengurusan kehakiman (lihat perenggan 26).

(3) PI telah menyampaikan lampiran 14 pada peguamcara pemohon dan ia tidak adil dalam menafikan hak pemohon untuk membalas atau membantah lampiran 14. Mahkamah berpendapat bahawa pengarah sebuah syarikat di bawah perintah pengurusan kehakiman tidak kehilangan baki kuasanya dalam erti kata atau tidak melibatkan perkara-perkara yang tidak termasuk dalam bidang kuasa pengurus

kehakiman setelah pengurusan kehakiman diperoleh. Lampiran 14 mempengaruhi perintah pengurusan kehakiman yang dipohon oleh pemohon dan ia adalah tidak adil untuk tidak membenarkan dan/atau menolak pemohon dalam situasi hak untuk didengar dan membantah lampiran 14 yang mempunyai kesan untuk mengetepikan perintah pengurusan kehakiman tersebut yang telah dipohon oleh pemohon. Mahkamah tidak bersetuju dengan PI mengenai isu pengarah pemohon yang tidak mempunyai locus untuk mengikrarkan sebarang afidavit dalam membantah lampiran 14 tersebut (lihat perenggan 28–29).

(4) Ia adalah jelas bahawa mana-mana pihak boleh membuat permohonan untuk mencelah lebih-lebih lagi apabila prosiding di hadapan mahkamah dan perintah yang diberikan berdasarkan kepada permohonan ex parte kerana setiap permohonan ex parte dapat diketepikan oleh pihak yang telah disampaikan dengan perintah tersebut atau oleh mana-mana pihak yang terkesan dengan perintah tersebut (lihat perenggan 31).

(5) Atas isu bahawa pemohon telah gagal melampirkan apa-apa resolusi yang telah meluluskan permohonan pengurus kehakiman untuk dilantik bagi syarikat tersebut, tidak ada keperluan di bawah ss 404 dan 405 Akta Syarikat 2016 atau di bawah Kaedah-Kaedah Syarikat (Mekanisme Penyelamat Korporat) 2018 bagi setiap resolusi yang harus dilampirkan pada permohonan pengurusan kehakiman berkenaan dengan kelulusan syarikat pemohon dalam permohonan pengurus kehakiman untuk dilantik bagi syarikat tersebut. Pemohon tidak memuaskan mahkamah mengenai pernyataan berkenaan dengan setiap 'pemiutang' pemohon berkenaan dengan penghakiman persetujuan dan tuntutan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') yang tidak diekshibitkan dalam afidavit pemohon di hadapan mahkamah. Oleh sebab pemohon gagal membuktikan hutang yang kena dibayar kepada pemiutang lain, PI dalam keadaan ini harus dianggap sebagai pemiutang terbesar pemohon (lihat perenggan 32 & 34–35).

(6) Oleh sebab pemohon telah gagal membuat pendedahan penuh dan terus terang kesemua fakta material di hadapan mahkamah semasa permohonan pengurusan kehakiman, dapatan bahawa terdapat tindakan secara tersembunyi untuk menyembunyikan permohonan pengurusan kehakiman dalam tindakan sivil, dakwaan oleh pemohon mengenai pengurusan kehakiman berkenaan dengan pemiutang pemohon melalui perintah persetujuan dan tuntutan Akta yang tidak diekshibitkan di hadapan mahkamah hanyalah pernyataan semata-mata atau dakwaan kosong dan ia telah terbukti bahawa permohonan pengurusan kehakiman untuk lanjutan masa akan menjadi latihan yang sia-sia di mana PI, berdasarkan keterangan di hadapan mahkamah dan sebagai pemiutang majoriti berhak untuk membantah cadangan tersebut berdasarkan s 412(2) Akta Syarikat 2016, mahkamah membenarkan

permohonan PI untuk mengetepikan perintah pengurusan kehakiman (lihat perenggan 39).]

Cases referred to

Equiticorp Holdings Ltd v United Securities Sdn Bhd [2007] MLJU 890; [2007] 6 CLJ 268, CA (folld)
Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd [2020] MLJU 723, HC (folld)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)
Lai Cheng Ooi v Lim San Peen & Anor and other appeals [2018] 5 MLJ 195; [2018] 7 CLJ 145, FC (refd)
Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473; [2018] 10 CLJ 412, HC (refd)
Union Accident Insurance Co Ltd, Re [1972] 1 All ER 1105, Ch D (folld)
Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd) [2020] MLJU 1827, HC (folld)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325; [1991] 3 CLJ 2078; [1991] 1 CLJ Rep 436, SC (folld)

Legislation referred to

Companies Act 2016 ss 404, 405, 410, 411, 412(2), 414, 420(1), 430(1), 536, 537, 538, 539, Part III, Division 8, Sub-Division 2
Companies (Corporate Rescue Mechanism) Rules 2018
Construction Industry Payment and Adjudication Act 2012
Rules of Court 2012 O 1A r 1, O 2 r 1

Eric Tan Choon Heong (Michelle Siah Yi Yen with him) (Ong Kok Bin & Co) for the applicant.
Vinoben a/l A Mathaivaranam (Tan Vincent with him) (Vincent Tan & Azmi) for the respondent.
Kevin Cheong Heng Wai (The Chambers of Cheong) for the judicial manager.

Nadzarin Wok Nordin JC:

PREFACE

[1] By way of an application to intervene at encl 14 ('encl 14') by the proposed intervener, TSK Hardware Sdn Bhd ('PI'), the PI had also applied to, inter alia, set aside the judicial management order ('JM order') dated 9 July 2020 granted by this court to the applicant, Twin Unitrade Sdn Bhd ('applicant').

[2] There is also before this court an application in encl 29 ('encl 29') filed by the applicant for, inter alia, an order for an extension of time to serve the applicant's affidavit in reply to encl 14 affirmed on 8 October 2020 which can be found at encl 23.

[3] The judicial manager, Dato Dr Shammuganathan a/l Vellathurai ('JM') had also filed an application for order for an extension of time of 60 days ('EOT') from the date of the order for the JM to send a statement of proposal to the creditors of the applicant in compliance with s 420(1) of the Companies Act 2016 under encl 17 ('encl 17') which has yet to be heard pending the decision of this court in encl 29 and 14.

BACKGROUND FACTS

[4] The applicant is a private limited company having a business in Johor Bahru as builders and contractors.

[5] The PI had sold and delivered building materials to the applicant amounting to RM350,929.71.

[6] As a result of the applicants failure to pay the PI the materials supplied, the PI had commenced an action against the applicant vide Sessions Court Johor Bahru Writ No JA-B52NCC-227–12 of 2019 ('civil suit').

[7] On 22 May 2020 the applicant had filed an ex parte orginating summons ('JM application') for the applicant to be placed under the judicial management of a judicial manager under s 405 of the Companies Act 2016.

[8] The PI had obtained a judgment dated 9 June 2020 for the sum of RM524,105.92 ('judgment') against the applicant vide a summary judgment application in the civil suit.

[9] On 9 July 2020 the Kuala Lumpur High Court had granted order in terms for the JM application ('JM order') and appointed the JM.

[10] Due to the failure of the applicant to make payment towards the judgment, the PI had also attempted to garnish the applicant's Affin Islamic Bank account by way of an order of court dated 9 July 2020 but was informed by the JM via a letter dated 20 July 2020 that there was a JM order in place.

[11] The PI then filed a proof of debt ('POD') with the JM on 28 July 2020. To-date there has been no challenge by the applicant as to the debt owed to the PI.

PI'S SUBMISSIONS

[12] The PI claims that it is a substantial creditor who holds more than 75% of the disclosed debts and that the applicant's claim that it owes Antah Schindler via a Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') decision for RM2,240,165.73 is unsubstantiated by any evidence and the same goes for the consent judgments allegedly recorded between the applicant and Gala Performance Sdn Bhd for RM24,700 and JX Ply Sdn Bhd for RM10,000.

[13] The PI states that there is no delay in filing encl 14 as:

(a) the applicant did not divulge at the civil suit that they had applied for a JM order;

(b) the applicant advertised the notice for application for the JM order in the newspapers on 12 June 2020;

(c) the applicant remained silent on the JM application despite being served with the judgment on 23 June 2020 via service of the judgment upon the applicant's solicitors;

(d) the PI was only made aware of the JM order by way of a letter dated 20 July 2020; and

(e) after filing their POD on 28 July 2020 and obtaining no response, the PI then filed encl 14 on 30 September 2020.

[14] The PI submits that it has the necessary locus standi to intervene in the proceedings before this court as it is a creditor by virtue of the judgment.

[15] It is also submitted by the PI that the applicant had failed to enclose any resolution which had approved the application for a judicial manager to be appointed over the company.

[16] The PI contends that the applicant had failed, inter alia, to inform this court at the hearing of the JM application that the PI had obtained the judgment against the applicant. It is also submitted by the PI that there has been no appeal against the judgment.

[17] It is also contended by the PI that the director of the applicant no longer has any jurisdiction to affirm any affidavit in respect of encl 14 and that the JM should be the one affirming the same instead.

[18] The PI further submits that the applicant being a company with a registered office and a business address at Johor Bahru had on purpose filed the

JM application at Kuala Lumpur instead of in Johor Bahru where the respective court actions against the applicants were filed and that the applicant had failed to show in the JM application that it had any assets within the jurisdiction of Kuala Lumpur. It is thus contended by the PI that the JM application was filed in Kuala Lumpur with the purpose of avoiding its creditors in Johor Bahru from having any knowledge of the JM application, and that the service of the cause papers in the JM application on the Suruhanjaya Syarikat Malaysia ('SSM') or the advertisement of the JM application in the newspapers were not effective nor unable to bring to the notice of the applicants creditors of the JM application.

[19] It is also submitted by the PI that there is no reasonable prospect of the scheme of proposal under the JM order being approved or that the objective of the JM will be achieved, and that from the date of the judgment till todate neither the applicant or the JM has proposed any scheme of proposal to its creditors or that it will be able to obtain any financing facilities or assistance from any third party.

[20] The PI thus submits that the JM order should be set aside on the grounds submitted above.

JM AND APPLICANT'S SUBMISSIONS

[21] With regards encl 29, the applicant has stated its grounds in support of the same are, inter alia:

(a) encl 14 was served on the applicant's solicitors on 2 October 2020;

(b) the applicant had filed its affidavit in reply by way of electronic mail, courier and registered post to the PI's solicitors on 16 October 2020;

(c) the hardcopy of the applicant's affidavit in reply was served by courier on 20 October 2020 and by registered post on 22 October 2020 at the PI's solicitors office;

(d) no substantial miscarriage of justice has been occasioned or occurred to the PI by reason of the service via electronic mail service and made available to the PI then; and

(e) the earliest date the PI's solicitors is able to accept service of the applicant's affidavit in reply is on 18 October 2020 as they operate from Sunday to Thursday and that the hardcopy of the applicant's affidavit in reply is deemed as delivered in the ordinary course of posting on 18 October 2020.

[22] The JM submits that it is guided by the court as to whether the PI should be allowed to intervene but opposes the PI's application to set aside the JM order in encl 14. **A**

[23] The JM has stated that he has prepared a concept scheme and is now seeking for the EOT as per encl 17. **B**

[24] The JM and/or the applicant also submits, inter alia, that:

(a) there is no live proceeding before the court and that the court is functus officio; **C**

(b) there is a delay in filing encl 14;

(c) the applicant had complied with all the requirements under the Companies Act 2016 before this court in its application for the JM order; **D**

(d) encl 14 is premature and seeks that the creditors be allowed to decide on the proposal; and

(e) the application by the PI via encl 14 to set aside the JM order is not bona fide as it is an attempt to scuttle and derail encl 17 to the detriment of all other creditors. **E**

FINDINGS

Enclosure 29 **F**

[25] After considering the grounds as relied on by the applicant for encl 29 and applying O 2 r 1 of the Rules of Court 2012 on the effect of non compliance of the rules which provides where: **G**

> there has, by reason of any thing done or left undone, been non-compliance with the requirement of these rules, the non-compliance shall be treated as an irregularity;

As well as O 1A r 1 of the Rules of Court 2012 which reads: **H**

> In administering these rules, the court or a judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these rules.

This court finds that there has been no miscarriage of justice or prejudice caused to the PI and that in the interest of justice, this court will allow the applicant's affidavit in reply at encl 22 to be deemed as good service and accordingly grants order in terms for encl 29. **I**

Locus standi and issue of delay on encl 14

[26] I have considered the facts surrounding the PI's application to intervene and from the chronology of events which transpired from the time of the JM application to the date of encl 14 being filed, find that there is no inordinate delay in filing encl 14 as the PI was only made aware of the JM order by way of the JM's letter dated 20 July 2020 addressed to Affin Islamic Bank and copied to the PI as seen in exh LTYT6 in encl 15 and that the PI had after filing their POD on 28 July 2020 and obtaining no response, filed encl 14 on 30 September 2020 which is a total of approximately slightly over two months from the time that the PI had notice of the JM order. I must for the record state that in this respect, neither the applicant nor the JM had informed the PI of the JM order directly despite the garnishee order being served on the applicant on 14 July 2020, see the PI's solicitors letter dated 13 July 2020 at exh LTYT5 of encl 15, and that the PI was only served with a copy of the JM order by way of an email dated 22 July 2020 from the JM as seen in the said exh LTYT6 in encl 15.

[27] I further hold that based on my previous decisions in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2020] MLJU 1827 with regards the issue of locus standi in a judicial management matter as well as *Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723 with regards the right of a creditor to intervene in a judicial management matter, which I hold are applicable to the facts of the matter before me, this court is allowing the PI to intervene and order in terms is hereby ordered in respect of the intervention.

[28] There is also the issue of the PI's contention of the applicant's directors lack of locus standi in opposing encl 14 vis a vis the applicant's affidavit in reply which this court holds as being misconceived for the following reasons:

(a) the PI had served encl 14 on the applicants solicitors and thus on the basis of the same it would be inequitable to deny the applicant its right to a response and/or to oppose encl 14;

(b) it is the view of this court that the director of a company under a JM order does not loose his residual powers in the sense of or not involving any matters not coming within the purview of the judicial manager once a JM order is obtained. In that respect any matters which are not specifically management powers which affect the affairs, business and property of the company or any other acts which the court may order involving the company where the JM order is given by the court are still within the rights of and exercisable by a director of the company, subject to such rights not being inconsistent with or infringe the powers of the JM under Part III, Division 8, Sub Division 2 of the Companies Act

2016, in particular ss 410, 411 and 414. It is also my view that as the effect of the JM order is as though the company is being wound up as per s 430(1) of the Companies Act 2016 which provides that '(1) At any time when a judicial management order is in force in relation to a company under judicial management, ss 536, 537, 538 and 539 shall apply as if the company under the judicial management was a company being wound up and the judicial manager was the liquidator'. I find that the cases on the residual power of directors in a wound up company such as *Equiticorp Holdings Ltd v United Securities Sdn Bhd* [2007] MLJU 890; [2007] 6 CLJ 268, *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325; [1991] 3 CLJ 2078; [1991] 1 CLJ Rep 436 and *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 as instructive and of assistance in ascertaining the board's residual powers and I hold that the board of directors do continue to hold certain residuary powers such as authority to instruct solicitors and counsel to oppose an application to set aside the JM order and to appeal against any such order made;

(c) encl 14 affects the JM order which was applied for by the applicant and it would be unjust to disallow and/or deny the applicant in such situations the right to be heard and to oppose encl 14 which has, inter alia, the effect of setting aside the very JM order which the applicant had applied for; and

(d) the JM is only in a position to respond and/or reply to any matters affecting the applicant company after the JM has taken over the company in accordance with the JM order and the JM would thus not be in a position to respond or reply to matters which occurred prior to the JM order as in the matter before this court, vis a vis the JM application, as he would have had no personal knowledge of the same and was not ipso facto involved in the JM application.

[29] This court therefore disagrees with the PI on the said issue of the applicant's director having no locus to affirm any affidavit in opposing the said encl 14.

Enclosure 14

[30] I will now address encl 14, vis a vis the setting aside of the JM order.

[31] I have considered the applicant's argument that the court is, inter alia, functus office and that there are no live proceedings before this court. I am unable to accept this line of argument as it is clear that any party may apply to intervene in a proceedings more so when the proceedings before the court and

A the order given thereto is based on an ex parte application as any ex parte order is liable to be set aside by the party who had been served with such an order or by any party which is affected by such order, see *Lai Cheng Ooi v Lim San Peen & Anor and other appeals* [2018] 5 MLJ 195; [2018] 7 CLJ 145 where the Federal Court held:

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> [17] An order made ex parte may be regular, in that it was made within jurisdiction. But that does not mean that an ex parte order could not be set aside, be it by the same or different judge of the court which granted the ex parte order.

C **[32]** On the issue that the applicant had failed to enclose any resolution which had approved the application for a judicial manager to be appointed over the company, this court holds that there is no requirement under ss 404 and/or 405 of the Companies Act 2016 nor under the Companies (Corporate Rescue Mechanism) Rules 2018 for any resolution to be attached to the JM
D application with regards the applicant's company approval in the application for a judicial manager to be appointed over the company.

[33] What the court has to be satisfied in granting the JM order is the
E requirements in ss 404 and/or 405 of the Companies Act 2016 are achieved or fulfilled at the JM application stage in granting the JM order.

[34] As to the alleged creditors of the application, it is settled law that judicial appreciation of any averments in an affidavit must depend on the evidence
F supporting the same and that mere or bare averments are not ipso facto prove of such averments without any corroborating evidence. That being the case, I find that the applicant has not satisfied this court as to the assertions with regards the respective 'creditors' of the applicant vis a vis the purported consent judgments and CIPAA claims which were not exhibited in any of the
G applicant's affidavits before this court.

[35] Based on my findings that the applicant has failed to prove the debts owed to the other creditors, the PI would in the circumstances have to be considered the biggest creditor of the applicant/company as evidenced by exh
H LFY4 of the applicant's affidavit in support at encl 2.

[36] It would thus in the circumstances be an 'exercise in futility' for an application for an extension of time to be granted to the JM as per encl 17 as the
I PI being the majority creditor would by virtue of the same be entitled to oppose the proposal and s 412(2)of the Companies Act 2016 which states:

> (2) The proposal shall be approved by seventy-five per centum of the total value of creditors whose claims have been accepted by the judicial manager, present and

> voting at the meeting either in person or by proxy and the proposal may be approved with modifications subject to the consent of the judicial manager to each modification.

Would then come into play to prevent the proposal from being approved.

[37] I also find from the facts before me that the applicant had at the time of the JM application failed to inform this court of the judgment obtained by the PI and this together with the fact that the application had been filed in Kuala Lumpur when the applicant was in fact a company based in Johor Bahru are in the considered view of this court factors which constitute a lack of bona fides on the part of the applicant. This court also finds the conduct of the applicant in not informing the PI or the sessions court in the civil suit of the JM application as being surreptitious and that such acts of concealing the JM application in the civil suit appear to this court to be deliberate and conscious acts which would have a bearing on the JM application and the subsequent JM order.

[38] The law on any ex parte applications have been clearly stated in various case law authorities on the subject such as *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473; [2018] 10 CLJ 412, where Her Ladyship Wong Chee Lin JC (as she then was) had stated:

> It is trite law that in an ex parte application, the applicant has a duty to the court to make full and frank disclosure of all material fact.

This principle can also be found in the Court of Appeal judgment of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316 where the Court of Appeal in a judgment read by Richard Malanjum JCA (as he then was) stated that:

> It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant.

[39] Based on my above findings that the applicant had:

(a) failed to make a full and frank disclosure of all material facts before this court at the time of the JM application;

(b) the finding by me that there was a surreptitious act of concealing the JM application in the civil suit;

(c) shown that the averments by the applicant and/or the JM with regards the applicants creditors vide the purported consent judgments and CIPAA claims which were not exhibited before this court are mere assertions or bare averments;

(d) proven that the JM's application for an EOT will be an exercise in futility where the PI, based on the evidence before this court, as the majority creditor would be entitled to oppose the proposal by virtue of s 412(2) of the Companies Act 2016 this court will hereby allow the PI's application to set aside the JM order.

[40] I thus grant order in terms for encl 14 prayers 1, 2, 4 and 5 with regards costs.

Order accordingly.

Reported by Mohd Kamarul Anwar